

SO ORDERED.**SIGNED this 23rd day of October, 2020.**

The signature of Lena Mansori James is written in cursive over a horizontal line.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

IN RE:)	
)	
Delphine Elizabeth James)	Case No. 20-50263
)	
Debtor.)	Chapter 7
_____)	
)	
Delphine Elizabeth James,)	
)	
Plaintiff,)	Ad. Proc. No. 20-06085
v.)	
)	
Select Portfolio Servicing, Inc.,)	
)	
Defendant.)	
_____)	

ORDER DISMISSING ADVERSARY PROCEEDING

This adversary proceeding comes before the Court upon the motion to dismiss and supporting brief filed by Select Portfolio Servicing, Inc., (the “Creditor”) pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), as made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012, for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted (Docket No. 5, 6, collectively the “Motion”).¹

¹ Unless otherwise indicated, the record citations refer to Case No. 20-06085, rather than the underlying bankruptcy case, Case No. 20-50263.

The Creditor argues that the Plaintiff's daughter and attorney-in-fact, L'Tanya J. Blyther, who signed and filed the complaint (Docket No. 1, the "Complaint"), is not a licensed attorney and lacks standing to litigate this proceeding. The Creditor argues that this lack of standing deprives the Court of subject matter jurisdiction, warranting dismissal under Rule 12(b)(1). The Creditor also argues the Plaintiff fails to state a claim upon which relief can be granted, thus meriting dismissal under Rule 12(b)(6).

Neither the Plaintiff nor Ms. Blyther filed a response to the Motion. Ms. Blyther did appear at the telephonic hearing on the Motion on October 14, 2020, at which Jennifer K. Brown also appeared on behalf of the Creditor. For the reasons discussed below, the Court will grant the Motion and dismiss the Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).² The Court dismisses this adversary proceeding without leave to amend because it finds, sua sponte, that permissive abstention under 28 U.S.C. § 1334(c)(1) is appropriate with regard to the claims at issue in this proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

A defendant challenging subject matter jurisdiction under Rule 12(b)(1) may challenge jurisdiction in one of two ways: facially or factually. *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (summarizing the differences between facial and factual challenges). In a facial challenge, the plaintiff "is afforded the same procedural protection as she would receive under a Rule 12(b)(6) consideration, wherein the facts alleged in the complaint are taken as true[.]" *Id.* (internal citation omitted). The Creditor's assertion that Ms. Blyther lacks standing to bring this Complaint on the Plaintiff's behalf is a facial attack. *See Foster v. Sligar (In re Foster)*, No. EC-11-1706, 2012 WL 6554718, at *4 (9th Cir. B.A.P. Dec. 14, 2012).

² Because the Court dismisses the Plaintiff's claims on Rule 12(b)(1) grounds it need not address the Rule 12(b)(6) standard or apply it to the facts of this case. *See, e.g., Watkins v. Lincoln Cmty. Health Ctr., Inc.*, No. 1:12CV1250, 2013 WL 2285250, at *3 n. 2 (M.D.N.C. May 23, 2013); *Orange Cty. Rescue Squad, Inc. v. County of Orange*, No. 1:09CV244, 2011 WL 976768, at *11 (M.D.N.C. Mar. 17, 2011).

Therefore, the Court “must accept as true all material factual allegations in the complaint and must construe the complaint in favor of the plaintiff.” *Morgan v. Town of Mineral*, No. 3:11-cv-00065, 2012 WL 5464633, at *2 (W.D. Va. May 4, 2012) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The Court may also look beyond the pleadings in evaluating a motion to dismiss under Rule 12(b)(1). 2 MOORE’S FEDERAL PRACTICE § 12.30(3) (2020). The Court thus takes judicial notice of pertinent docket entries and papers within this adversary proceeding and the underlying bankruptcy case. *See Anderson v. Fed. Deposit Ins. Corp.*, 918 F.2d 1139, 1141 n. 1 (4th Cir. 1990); *see also Brown v. Ocwen Loan Servicing, LLC*, No. 14-3454, 2015 WL 5008763, at *1 n. 3 (D. Md. Aug. 20, 2015), *aff’d*, 639 Fed. App’x. 200 (4th Cir. 2016).

For purposes of the Motion, the Court makes the following findings:

1. The Plaintiff filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code on March 16, 2020 (Case No. 20-50263, Docket No. 1).
2. The Plaintiff’s daughter, L’Tanya Blyther completed the Plaintiff’s petition and signed her own name on the line reserved for “Signature of Debtor 1.”
3. Attached to the Plaintiff’s bankruptcy petition is a copy of a notarized power of attorney, executed by the Plaintiff on March 12, 2020, designating Ms. Blyther as attorney-in-fact for the Plaintiff.
4. The power of attorney authorizes Ms. Blyther to “file a PETITION FOR BANKRUPTCY, to file under any and all appropriate existing BANKRUPTCY CHAPTERS: 7, 11, 13, ETC.”
5. The power of attorney also authorizes Ms. Blyther “to engage in any and all actions, assume responsibility for all required signatures, attend all required classes, information sessions, other required meetings/sessions associated with completion of the Bankruptcy process.”

6. The Plaintiff's Schedule A/B indicates the Plaintiff owns an interest in 2907 Bon Air Avenue, Winston-Salem, NC 27105 (the "Property") (Case No. 20-50263, Docket No. 1).
7. The Plaintiff's Schedule D reflects the Property is encumbered by a secured mortgage held by U.S. Bank National Association, and serviced by the Creditor, in the amount of \$78,000.
8. Line 10 of the Plaintiff's Statement of Financial Affairs indicates that the Creditor had already initiated a foreclosure proceeding against the Property in late 2019.
9. On May 28, 2020, the Creditor filed a motion for relief from stay to allow it to exercise its state law rights with respect to the Property (Case No. 20-50263, Docket No. 24).
10. On May 29, 2020, the chapter 7 trustee filed a report of no distribution, indicating there was no property available for distribution from the estate over and above that exempted by law.
11. On June 8, 2020, Ms. Blyther filed an objection to the Creditor's motion for relief from stay, purportedly in her capacity as attorney-in-fact for the Plaintiff (Case No. 20-50263, Docket No. 29).
12. The Plaintiff received a discharge under 11 U.S.C. § 727 on June 24, 2020.
13. On July 1, 2020, the Creditor filed an amended motion for relief from stay regarding the Property (Case No. 20-50263, Docket No. 34).
14. Ms. Blyther filed another objection to the Creditor's amended motion for relief from stay on July 21, 2020 (Case No. 20-50263, Docket No. 38).
15. The Plaintiff filed the instant adversary proceeding on July 10, 2020, challenging the accuracy of the payment history provided by the Creditor in its amended motion for relief from stay, asserting that the Creditor wrongly charged the Plaintiff for hazard insurance on the Property, and requesting "that all protections and required hearings be

held to insure the protection of the rights of [Plaintiff], with the end goal of negotiating an amiable resolution, insuring the protection of Movant, [Creditor's] financial interest and [Plaintiff's] ability to maintain possession of her home for the past 50 years and payment in full for the same" (Docket No. 1, the "Complaint").

16. The Complaint bears the purported signature of the Plaintiff as well as Ms. Blyther as attorney-in-fact.
17. On August 12, 2020, the Creditor filed the Motion, requesting dismissal of the case for lack of standing and pursuant to Rule 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted (Docket No. 5, 6).
18. On August 26, 2020, the Court entered an order granting the Creditor's motion for relief from stay in the underlying bankruptcy case (Case No. 20-50263, Docket No. 41).
19. Neither the Plaintiff nor Ms. Blyther filed a response to the Creditor's Motion.
20. No attorney has entered a notice of appearance on behalf of the Plaintiff in either the adversary proceeding or the underlying bankruptcy case.
21. The only party that has appeared on the Debtor's behalf at any hearing in this adversary proceeding or the underlying bankruptcy case has been Ms. Blyther. The Plaintiff herself has not appeared at any of the hearings.

DISCUSSION

Dismissal Under Rule 12(b)(1)

Defendant moves to dismiss Plaintiff's Complaint because Ms. Blyther lacks standing to litigate the claims on the pro se Plaintiff's behalf and for lack of subject matter jurisdiction, which constitute the same basis for dismissal. *See Foster v. Sligar (In re Foster)*, No. EC-11-1706, 2012 WL 6554718, at *4 (9th Cir. B.A.P. Dec. 14, 2012) ("Because standing pertains to a federal court's subject matter

jurisdiction, a motion to dismiss for lack of standing is properly brought as a motion to dismiss for lack of subject matter jurisdiction under Civil Rule 12(b)(1).”) Federal Courts are courts of limited jurisdiction and the burden of establishing subject matter jurisdiction is on the Plaintiff, the party asserting jurisdiction. *Robb Evans & Assocs., LLC v. Holibaugh*, 609 F.3d 359, 362 (4th Cir. 2010).

The Defendant asserts Ms. Blyther lacks standing to initiate this Complaint on behalf of her mother, the Plaintiff. The power-of-attorney that Ms. Blyther relies upon permits her to file the underlying bankruptcy on behalf of the Plaintiff, *see In re O'Connor*, No. 08-16434, 2009 WL 1616105, at *2 (Bankr. N.D. Ohio Feb. 27, 2009) (quoting *In re Curtis*, 262 B.R. 619, 622 (Bankr. D. Vt. 2001)) (“It appears well-settled that a bankruptcy case may be commenced through an attorney-in-fact in appropriate circumstances.”), but North Carolina law,³ local federal rule,⁴ and pertinent caselaw from within the Fourth Circuit prohibits Ms. Blyther from litigating this adversary proceeding on behalf of the pro se Plaintiff. *See, e.g., Dyson v. PNC Bank*, No. 4:17-CV-98-FL, 2017 WL 8776502, at *1 (E.D.N.C. Nov. 10, 2017) (finding power of attorney did not vest a non-attorney plaintiff with the authority to litigate his mother’s claims in federal court); *Bank of Am. v. Campbell*, No. 1:12CV269, 2012 WL 1951820, at *2 (M.D.N.C. May 30, 2012) (finding that “district courts in this Circuit uniformly have precluded non-attorneys from litigating matters in the name of others based on claimed authority from some form of ‘power-of-attorney’”). “An individual unquestionably has the right to litigate his *own* claims in federal court,” but “[t]he right to litigate for *oneself*, however, does not create a coordinate right to litigate for *others*.” *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d

³ See N.C. Gen. Stat. § 84-4 (“Except as otherwise permitted by law, it shall be unlawful for any person or association of person, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body ... [and] to maintain, conduct, or defend the same, except in his own behalf as a party thereto ...”). *See also* N.C. Gen. Stat. § 84-2.1 (defining “practice law”).

⁴ M.D.N.C. Local Civil Rule 83.1(c), which is labeled “Litigants Must Be Represented by a Member of the Bar of this Court,” provides that “[l]itigants in civil and criminal actions and parties in bankruptcy proceedings before this Court, except parties appearing pro se, must be represented by at least one attorney who is a member of the bar of this Court.”

395, 400 (4th Cir. 2005) (emphasis original). The power-of-attorney Ms. Blyther cites does not allow her to circumvent North Carolina law, federal rule, and binding caselaw regarding the unauthorized practice of law. While the Plaintiff would be entitled to pursue the Complaint on her own behalf, or retain a licensed attorney to do so, Ms. Blyther is not authorized to litigate the claims on her mother's behalf. Accordingly, the Complaint must be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

Permissive Abstention

When an action is dismissed for lack of subject matter jurisdiction, leave to amend is appropriate when the defect can be cured, particularly in the case of a pro se complaint. *See Foster v. Sligar (In re Foster)*, No. EC-11-1706, 2012 WL 6554718, at *7 (9th Cir. B.A.P. Dec. 14, 2012). The Plaintiff conceivably could pursue the Complaint on her own behalf or retain an attorney to represent her, but, given the context of this adversary proceeding and the procedural posture of the Plaintiff's underlying bankruptcy case, the Court declines to provide leave to amend in this instance because, even if the jurisdictional defects were cured, this Court would permissively abstain from hearing the claims under 28 U.S.C. § 1334(c)(1).

This Court may raise the issue of permissive abstention sua sponte. *See Alarid v. Pacheco (In re Pacheco)*, 616 B.R. 126, 133 n. 12 (D.N.M. 2020); *Bricker v. Martin*, 348 B.R. 28, 33 (W.D. Pa. 2006), *aff'd*, 265 F. App'x 141 (3d Cir. 2008); 1 COLLIER ON BANKRUPTCY ¶ 3.05(4) (16th ed. 2020). When determining whether permissive abstention is appropriate, the non-exclusive factors a court should consider are:

- (1) efficiency in the administration of the debtor's estate;
- (2) the extent to which state law issues predominate over bankruptcy issues;
- (3) whether the issues involve difficult or unsettled issues of state law;
- (4) the presence of a related proceeding commenced in state court;
- (5) the existence of a jurisdictional basis other than 28 U.S.C. § 1334;
- (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
- (7) the substance rather than form of an asserted "core" proceeding;
- (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state courts;
- (9) the burden of the bankruptcy court's docket;
- (10) the likelihood that the commencement of the proceedings

in bankruptcy court involved forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) whether non-debtor parties are involved in the proceeding.

Harvey v. Dambowsky (In re Dambowsky), 526 B.R. 590, 606 (Bankr. M.D.N.C. 2015) (internal citation omitted). “Unlike the analysis of the necessity for mandatory abstention [under 28 U.S.C. § 1334(c)(2)], where all criteria must be satisfied to abstain from adjudication of a matter, these factors are weighed in light of the circumstances of the individual case.” *Smith v. McLeskey (In re Bay Vista of Va., Inc.)*, 394 B.R. 820 (Bankr. E.D. Va. 2008) (citing *Murphy v. Uncle Ben’s, Inc.*, 168 F.3d 734 (5th Cir. 1999)).

Even if the Plaintiff successfully cured the jurisdictional defects in this proceeding, the Court finds several factors strongly favor abstention, the combined effect of which can be summarized as follows: first, the Plaintiff has already received a discharge, the bankruptcy estate has been fully administered by the chapter 7 trustee, and the bankruptcy case is all but closed except for this pending proceeding; second, the Plaintiff’s Statement of Financial Affairs indicates a foreclosure proceeding was commenced prior to her bankruptcy filing and the claims at issue in the Complaint concern only state law issues and are better addressed within the foreclosure case; third, the Creditor did not file a proof of claim in this bankruptcy case and the Court has already granted relief from stay to the Creditor to recommence the foreclosure proceeding in state court.⁵ The factors favoring abstention decisively outweigh others, such as the absence of difficult or unsettled law and the burden on the bankruptcy court docket, which are either neutral or of minimal relevance within the context of this proceeding. *See, e.g., Dennis v. Bank United*, No. 10cv3147, 2011 WL 402481 (D. Md. Sept. 9, 2011), *aff’d*, 471 Fed. App’x. 250 (4th Cir. 2012); *Osuji v. HSBC Bank, U.S.A.*, 580 B.R. 605 (E.D.N.Y. 2018).

⁵ In the Order Granting Relief from Stay, the Court explained the limited duration of the automatic stay in a chapter 7 bankruptcy case and the potential advantages that a chapter 13 filing presents to debtors with a mortgage default or pending foreclosure (Case No. 20-50263, Docket No. 41).

The majority of factors weigh in favor of permissive abstention and the Court cannot identify a compelling reason why this proceeding should be heard in bankruptcy court rather than state court.

CONCLUSION

For the reasons discussed above, THE COURT FINDS that, assuming the Plaintiff cured the jurisdictional deficiencies warranting dismissal under Rule 12(b)(1), the Court would nevertheless abstain from hearing and determining this adversary proceeding under 28 U.S.C. § 1334(c)(1).

Accordingly, IT IS HEREBY ORDERED that the Creditor's Motion to Dismiss is GRANTED and the Plaintiff's Complaint is DISMISSED without leave to amend.

IT IS FURTHER ORDERED that this adversary proceeding may be closed.

END OF DOCUMENT

PARTIES TO BE SERVED

Delphine Elizabeth James v. Select Portfolio Servicing, Inc.

20-06085

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